IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 804 of 1992

For Approval and Signature:

Hon'ble MR.JUSTICE C.K.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

STATE OF GUJARAT

Versus

KHUMANSINH HEMAJI CHAUHAN

Appearance:

MR BY MANKAD, APP for Petitioner

MR NM AMIN for Respondent No. 1

MR KR RAVAL for Respondent No. 3

CORAM : MR.JUSTICE C.K.BUCH

Date of decision: 08/09/2000

ORAL JUDGEMENT

1. Heard learned APP Mr. B.Y. Mankad for the appellant,learned counsel Mr. Nitin Amin for Respondent Nos. 1 & 2 and learned counsel Mr. K.R.Raval for

Respondent no.3. Learned counsel Mr. Raval appearing for Respondent No.3 has endorsed the submissions made by learned counsel Mr. Amin appearing for Respondent Nos.1 & 2. Respondents are original accused and for the sake of convenience, they are referred to as the original accused in this judgment.

2. This appeal is preferred by the State against the judgment and order dated 30.5.1992 passed by the learned Sessions Judge, Mehsana in Criminal Appeal No.75/90 whereby the learned Sessions Judge allowed the appeal and quashed and set aside the judgment and order dated 8.8.1990 passed by learned Asstt. Sessions Judge, Mehsana in Sessions Case No. 23/88. Accused nos. 1 & 2 were convicted for the offences punishable under sec. 306 R/w sec.34 of IPC and were sentenced to suffer R/I for 5 Years and to pay a fine of Rs.500/- each (Rs. five hundred only), I/d to undergo S/I for 6 Months and accused no.3 was convicted for the offence punishable under sec.306, 109 R/w sec.34 of IPC and was sentenced to undergo R/I for 5 Years and to pay a fine of Rs. 500/ (Rs. Five hundred only).

3. Accused were charged for the offences punishable under sections 306, 109 R/w sec.34 of IPC. According to the prosecution, accused have abetted in the suicide committed by deceased Manoj, a boy aged about 16 years. After appreciating the oral as well as documentary evidence led by the prosecution during the course of trial of Sessions Case No. 23/88, accused came to be convicted and sentenced by the learned Asstt. Sessions Judge, vide judgment dated 8.8.1990 as stated above. Being aggrieved and dissatisfied with the said judgment, the accused preferred Criminal Appeal No. 75/90 before the learned Sessions Judge, Mehsana. Learned Sessions Judge, Mehsana, vide judgment and order dated 30.5.1992, allowed the appeal, quashed and set aside the judgment and order of conviction and sentence and acquitted the accused. Being aggrieved by the order of acquittal recorded by the learned Sessions Judge, the State has preferred this appeal.

4. When this appeal was circulated for admission, this Court, vide order dated 6.4.1994 (Coram: K.J.Vaidya & V.H.Bhairavia, JJ), passed following order:-

" Leave granted. Appeal admitted. Bailable warrant in the sum of Rs. 5000/ (Rs. Five thousand only) with one surety in the like amount each be issued against the respondents accused."

I am told that accused had offered bail as

ordered by this Court and they are on bail.

5. During the course of arguments, before dealing this appeal on merits, learned counsel Mr. Amin for the accused has pointed out that the impugned judgment and order of acquittal passed by the learned Sessions Judge, Mehsana in Sessions Case No. 75/90 was challenged by the original complainant by filing Cri.Misc. Application No.2147/93 in this Court, seeking leave to appeal. This Court (Coram : N.J.Pandya, J) passed following order in the said application on 2.7.1993 :-

" The applicant is seeking leave to appeal as respondent nos. 2 to 4 came to be acquitted by the learned Additional Sessions Judge, Mehsana when he dealt with Criminal Appeal No. 75 of 1990 arising out of an order of conviction passed by the learned Asstt.Sessions Judge in Sessions Case No. 23/88.

2. The facts narrated in brief, will make the position clear. The respondents were said to have beaten deceased Manoj in connection with the alleged eve-teasing that he had indulged into. Taking the beating that he had received at the hands of the accused according to the prosecution, the said Manoj took his own life and that is why offence under sec.306 and other related sections came to be registered against respondent nos. 2 to 4.

3. Now, if sec.306 I.P.Code is taken into consideration, the aforesaid respondents could be convicted or held responsible under the said section only if they have abetted the commission of such suicide. When this aspect is borne in mind and read along with Sec.104, 107, 108 and 109 as submitted by the learned Advocate for the petitioner, it becomes clear that unless abetment was clearly made out for bringing out the said act of suicide, there is not offence under sec.306. It is not possible to believe or even remotely suggest that the respondents had dealt with deceased Manoj in the aforesaid manner solely with a view to see that he commits suicide. It is indeed unfortunate that Manoj turned out to be a person of very sensitive nature and he took things to harsh and as a result, the aforesaid unfortunate incident or suicide has occurred. However, the law as it stands, would not permit respondents nos. 2 to 4 to be described as abetters under sec. 306 of

I.P.C. and in my opinion, the learned Sessions Judge has rightly acquitted them and there is no need for permission as sought for being granted and hence, the application is rejected. "

6. Mr.N.M.Amin, learned counsel appearing for the accused has submitted that the order of acquittal has been confirmed by this Court vide order reproduced herein above and, therefore, this appeal preferred by the State requires to be dismissed on the ground that the same is not maintainable, though leave is granted and appeal is admitted vide order passed by this Court on 6.4.1994. In support of his submission, Mr. Amin has placed reliance on the decision rendered in the case of State of Gujarat v/s Ramanbhai Durlabhbhai Patel & Anr.,reported in 1997(2) GLH 457. Considering the provisions of sec. 378(4) of CrPC, this Court has observed in para-7 as under:-

" The question may be examined from a different angle and the same result would ensue. If the order of acquittal passed in a criminal case arising from the private complaint is allowed to be challenged only by the private complainant in view of Section 378(4) of the Code, an undesirable result would follow. It is possible that, even if the order of acquittal is unsustainable in law, the private complainant may not challenge it in appeal if he is won over by the acquittal accused on some consideration, material or otherwise; or he is unable to prefer his appeal for diverse reasons. If the scheme of Section 378 of the Code has to be interpreted as to confer the right of appeal against the order of acquittal in a criminal case arising from a private complaint on the private complainant alone, the State Government will be a helpless onlooker or spectator if the private complainant does not choose to challenge or cannot challenge such order of acquittal. The Legislature could not have visualised helplessness on the part of the State Government to challenge the order of acquittal by the leave of this Court. The only embargo on the right of the State Government to challenge an order of acquittal is found in Section 378(6) of the Code. If an application for special leave to appeal against the order of acquittal made by the private complainant is rejected, the State Government is precluded thereby from filing any appeal inter alia under sub-section (1) thereof. Subject to this rider,

the State Government is free to challenge the order of acquittal under section 378(1) of the Code after obtaining leave of the High Court whether or not the concerned criminal case resulting in the order of acquittal has arisen from any private complaint. Even if the private complainant obtains special leave to appeal under sub-section (4) thereof, in my humble opinion the right of the State Government to appeal against the order of acquittal under sub-section (i) thereof is not lost."

7. The ratio propounded by this Court in the decision in the case of Ramanbhai (supra), squarely applies to the case on hand, though facts of both the cases are different. It is pertinent to note that dismissal of the application filed by the complainant by this Court is on merits and, therefore, entertainment of this appeal on merits would have an effect of double jeopardy and would compel the original accused to face identical proceedings again in this very Court. There cannot be two appeals against same judgment one after the another, unless such appeal is specifically provided under the law.

(i) This criminal appeal is preferred by the State ignoring the earlier judgment and order passed by this Court in Misc. Criminal Application No. 2147/93 on 2.7.1993. Original accused can legitimately raise points under rules for "Autrefois Acquit" and "Issue Estoppel". "Issue Estoppel" is a rule to prevent re-litigation on same issues based on similar set of facts. If we see intention of the legislature reflected in sub-sec.(1) of sec.300 of CrPC, this rule of "Issue Estoppel" is reflected in it. The present appellant - State of Gujarat was respondent no.1 in the above-referred criminal misc. application which has been decided on merits. Second criminal appeal proceedings by other party or party respondent of earlier proceedings after confirmation of acquittal, would violate the immunity granted to the accused under sec. 300 CrPC where facts situation are similar. While dealing with a case from Malaya State reported in Sambasivam v/s Public Prosecutor, reported in 1950 AC 458 at P.479, Lord MacDermott has observed as under:-

" The effect of a verdict of acquittal pronounced by a competent court on a lawful charge and after a lawful trial is not completely stated by saying that the person acquitted cannot be tried again for the same offence. To that it

> must be added that the verdict is binding and conclusive in all subsequent proceedings between the parties to the adjudication. The maxim "Res judicata pro veritate accipitur" is no less applicable to criminal than to civil proceedings. .... The appellant having been acquitted at the first trial on the charge of having ammunition in his possession the prosecution was bound to accept the correctness of that verdict and was precluded from taking any step to challenge it at the second trial. ...."

(ii) I agree that the set of facts before the Court was totally different, but the ratio decidendi can apply to the facts situation of the case before this Court. Confirmation of the acquittal of the present respondent by this Court, was otherwise binding to the State of Gujarat on more than one count viz. (i) that State Government was party respondent no.1 in that proceedings; (ii) prohibitory bar to second trial provided in sub-sec.(1) of sec.300 of CrPC, principlewise, can be made applicable to the second appeal after the confirmation of acquittal by the Court of competent jurisdiction on merits; and (iii) irrespective of the provisions of sub-sec.(1) of sec.300 CrPC and the scheme provided therein qua appeals, the rule of "Autrefois Acquit" is accepted in the criminal jurisprudence of this country.

(iii) While dealing with the case of Lalta and others v/s The State of U.P., reported in AIR 1970 SC P.1381, the Apex Court has drawn distinction between "Issue Estoppel" and "Autrefois Acquit". After referring and relying on the two decisions of the Apex Court in the case of Pritam Singh v/s State of Punjab, reported in AIR 1956 SC P.415 and in the case of Manipur Administration v/s Thokchom Bira Singh, reported in AIR 1965 SC P.87 and the decision in the case of Sambasivam (supra), the Apex Court has held that "where an issue of fact has been tried by a competent court on a former occasion and a finding of fact has been reached in favour of the accused, such a finding would constitute an estoppel or res judicata against the prosecution, not as a bar to the trial and conviction of the accused for a different offence but as precluding the reception of evidence to disturb that finding of fact when the accused is tried subsequently even for a different offence which might be permitted by the terms of Section 403(2) Criminal P.C. Sec.403 does not preclude the applicability of this rule of issue estoppel." Permit to prosecute the appellant

State a second appeal against the very judgment would amount to give an opportunity to replace the new arguments and willingness to receive different set of submissions which might disturb earlier finding recorded by a competent court. In case Marz v/s The Queen, 96 CLR P.62, p.p.68 & 69, the High Court of Australia has considered rule of "Issue Estoppel" on different set of facts. The High Court of Australia has observed as follows:-

" It is a negation in the alternative upon which, so long as the verdict stood in its entirety, the applicant was entitled to rely as creating an issue-estoppel against the Crown. He was entitled to rely upon it because when he pleaded not guilty to the indictment of murder the issues which were thereby joined between him and the Crown necessarily raised for determination the existence of the three elements we have mentioned and the verdict upon those issues must, for the reasons we have given, be taken to have affirmed the existence of the third and to have denied the existence of one or other of the other two elements. It is nothing to point that the verdict may have been the result of a misdirection of the judge and that owing to the misdirection the jury may have found the verdict without understanding or intending what as a matter of law is its necessary meaning or its legal consequences. The law which gives effect to issue estoppels is not concerned with the correctness or incorrectness of the finding which amounts to an estoppel, still less with the processes of reasoning by which the finding was reached in fact; it does not matter that the finding may be thought to be due to the jury having been put upon the wrong track by some direction of the presiding judge or to the jury having got on the wrong track unaided. It is enough that an issue or issues have been distinctly raised and found. Once that is done, then, so long as the finding stands, if there be any subsequent litigation between the same parties, no allegations legally inconsistent with the finding may be made by one of them against the other."

(Adopted & reproduced from the decision of the Apex Court in the case of Lolita and others v/s The State of U.P., AIR 1970 SC 1381").

(iv) Though the rules of "Issue Estoppel" and/or

"Autrefois Acquit" are discussed by the Apex Court and other Courts when the legality and sustainability of the second trial or another trial was brought before the respective Courts, the said rules can very well be stratched and applied to the proceedings of the present nature.

8. The order of dismissal of the application of the private complainant is prior to the order of this court granting leave to appeal and admitting the appeal preferred by the State. Had this order been brought to the notice of this Court at that relevant point of time, appeal preferred by the State might not have been admitted in view of the scheme as to the appeals reflected in the CrPC.

(ii) In light of the scheme of CrPC and above discussed two rules, I am afraid that the order of dismissal of present appeal also would be technically wrong in the eye of law because this Court is prevented or is precluded from receiving any fresh submission on merits by either of the parties because acquittal recorded earlier after appreciating the facts available on record by this Court is in force. Hence, without entering into the merits of the appeal, I am inclined to accept the arguments advanced by learned counsel Mr. Amin for the accused that this appeal requires to be dismissed, being unsustainable.

9. Before parting with the judgment, I would like to observe that when the State intends to prefer appeal at a belated stage, then before moving the appellate court, the State should ascertain whether the judgment and order of acquittal is challenged or not by the original complainant or by the aggrieved private party to avoid duplication of proceedings and unnecessary and unwarranted hardships to the accused already acquitted by the competent court of law.

10. For the reasons aforesaid, appeal is dismissed. Impugned order of Acquittal passed by learned Sessions Judge, Mehsana in Criminal Appeal No. 75/90 on 30.5.1992 remains confirmed as per the earlier decision of this Court (Coram: N.J.Pandya, J) dated 2.7.1993 in Cri. Misc. Application No. 2147/93 refusing to grant permission/ leave to appeal. Bail JJJJJ

Bonds given by the accused stand discharged.

8.9.2000 [C.K. BUCH, J]

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